

Tentative Rulings for September 29, 2003
Departments 22, 70, 72, 73

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, Rule 321(c).)

00CECG11606	Moran v. Three & Three Investments (Dept. 70)
03CECG01666	Britz Fertilizer, Inc. v. Worton (Dept. 70)
01CECG04283	Michailides v. Richardson (Dept. 73)
01CECG01130	Concord Car Center Inc v. Hausmann (Dept. 73)
625137-5	Flores v. NAPA (Dept. 70)
625136-7	Lopez v. NAPA (Dept. 70)
03CECG02652	Leal v. Xiong (Dept. 72)
03CECG00432	Central Valley Community Bank v. Hansen (Dept. 72)
03CECG02571	CitiCapital Commercial v. Grewal & Sons Express Inc (Dept. 72)

(Tentative Rulings begin at next page)

Tentative Ruling

Re: **Wanger v. EMC Mortgage Co. et al.**
Superior Court Case No. 604565-2

Hearing Date: September 29, 2003 **(Dept. 70)**

Motion: Compel Plaintiff to attend her deposition and
produce documents

Tentative Ruling:

To grant the motion pursuant to CCP § 2025(j)(3). The parties are to meet and confer regarding a mutually convenient date, time and place to depose the Plaintiff within the confines of CCP § 2025(e)(1). Sanctions in the amount of \$787 will be imposed in favor of the Defendant and against the Plaintiff, due and payable within 30 days of notice of the ruling.

Explanation:

The reversal and remand of the case *reopens* the time for discovery so that the last date for completing discovery as of right (pursuant to CCP § 2024(a)) is 15 days before the date initially set for the *new trial* of the action. See *Fairmont Ins. Co. v. Super.Ct. (Stendell)* (2000) 22 Cal.4th 245, 247. The agreement regarding the second deposition is “on the record” but it does not constitute a formal stipulation pursuant to CCP § 283(1) because it was not filed with the Clerk, i.e., it was not in writing nor was it entered in the minutes, i.e., it was not “on the record”. See *Palmer v. Long Beach* (1948) 33 C.2d 134, 142.

On the other hand, according to *1 Witkin California Procedure* (4th Ed. 1996) “Attorneys” § 295: “Despite the mandatory language of C.C.P. 283(1), many stipulations that fail to comply with either of the alternative forms prescribed in the statute are enforced. Id. “To give section 283 a literal construction would greatly retard the business of the court and lead to absurd consequences. Every admission, consent or agreement made in the course of the trial would either have to be reduced to writing or filed with the clerk or by the clerk entered in his minutes. It was never intended that the section should receive such a construction.” Id. citing *Continental Bldg. & Loan Assn. v. Woolf* (1910) 12 C.A. 725, 730.

In the case where the stipulation is improper in form, it has been held that the statute of frauds cannot be invoked to attack an *executed* (fully performed) contract; and one party may, as a result of his own conduct, be *estopped* to set up the statute as a defense to an executory contract. *Id.* citing inter alia 1 Witkin *Summary of California Law* (9th Ed. 1988), *Contracts*, §§317, 325. See also *Fidelity & Cas. Co. v. Abraham* (1945) 70 C.A.2d 776, 783: "If under the terms of a mutual stipulation, which was only verbal, one party has received the advantage for which he entered into it, or the other party has at his instance given up some right or lost some advantage, so that it would be inequitable for him to insist that the stipulation was invalid, he will not be permitted to repudiate the obligation of his own agreement, upon the ground that it had not been entered in the minutes of the court [citations omitted]."

In the case at bench, subsequent to May 9, 2000, the Defendant did not file a motion to compel the Plaintiff to produce the documents set forth in the deposition notice because there was an agreement between counsel that Defendant would have the right to depose the Plaintiff again. See Exhibit A attached to the Declaration of Withem consisting of the deposition of the Plaintiff on May 9, 2000 at pages 114: 13-21; 115:10-11; 116:4-6; 185:16-21. Thus, the Defendant gave up its right to compel pursuant to CCP § 2025(j)(3). Therefore, the stipulation will be enforced though defective in form. See *Fidelity & Cas. Co. v. Abraham*, *supra*.

In addition, the Plaintiff submits evidence attached to her Declaration that does not support her arguments. She submits as Exhibit D-1 the notice of deposition and production of documents for May 9, 2000. Consequently, she was obligated to appear **and** produce those documents pursuant to CCP § 2025(h)(1). She did not object prior to appearing for the deposition. Therefore, any objections were waived. See CCP § 2025(g). In addition, Exhibit F consists of the notice of the second deposition and production of documents to be taken on September 8, 2000. Exhibit G is a letter from her former attorney, Kirk Tracey to Defendant's attorney. The tone of the letter implies that the deposition was continued from September 8, 2000 to September 29th at the request of Tracey.

Finally, the argument that the Defendant must justify the need to depose the Plaintiff given the voluminous discovery propounded coupled with the fact that a motion for summary judgment has already been filed is meritless. There is no statutory prohibition regarding the propounding of discovery simultaneously or subsequently to the filing of a motion for summary judgment. Thus, the motion will be granted pursuant to CCP § 2025(j)(3).

Tentative Ruling **HAC** **9/25/03**
Issued By: _____ **on** _____.
 (Judge's initials) (Date)

Tentative Ruling

Re: **Wilson et al. v. Viking Freight Systems, Inc.
et al.**

Superior Court Case No. 03CECG00403

Hearing Date: September 29, 2003 (**Dept. 73**)

Motion: By Defendant American Red Ball International,
Inc. for Summary Judgment

Tentative Ruling:

To deny without prejudice on the grounds that the motion was not served upon all the parties as required by CCP § 437c(a). The proof of service filed on July 11, 2003 indicates that the attorney for Defendants John Anthony Imbelloni, FedEx Freight West, Inc. and FedEx Corporation was not served. These Defendants appeared in the action by filing answers on June 13, 2003. They are represented by Michael Lowe, Hanna Brophy MacLean McLeer & Jensen, LLP, 160 Sansome St. 6th Floor, San Francisco, CA 94104. Also, the address is incomplete for the attorney representing Defendant Daniel Alberto Jasso, the suite number is incorrect for the attorney representing Cross-Complainant Kimberly Cooper and the zip code is incorrect for the attorney representing Ryder Truck Rental and Larry Lacy.

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling **MWS** **9/25/03**

Issued By: _____ **on** _____ .

(Judge's initials) (Date)

Tentative Ruling

Re: **Winter v. Muntean, et al.**
Superior Court Case No: 644423-6

Hearing date: September 29, 2003 **(Dept. 73)**

Motion: Motion of defendants, Florin Muntean and Romulus Seicean, to dismiss for failure to prosecute

Tentative Ruling:

To grant. (Code Civ. Proc. §§ 583.410, 583.420; Cal. Rules of Court, rules 372, 373.) Moving parties are directed to submit to the court, within 10 days of service of the minute order by the clerk, a judgment dismissing the action.

Pursuant to California Rules of Court, rule 391(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling **MWS** **9/25/03**

Issued By: _____ **on** _____.

(Judge's initials) (Date)

Tentative Ruling

Re: **Thompson v. Graham, et al.**
Superior Court Case No: 03CECG02360

Hearing date: September 29, 2003 **(Dept. 70)**

Motion: Demurrer of defendant, Northstar Management, Inc., to complaint

Tentative Ruling:

The court finds the demurrer is moot in light of the first amended complaint filed pursuant to Code of Civil Procedure section 472. The hearing on the demurrer is therefore off calendar.

Pursuant to California Rules of Court, rule 391(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling **HAC** **9/25/03**

Issued By: _____ **on** _____.

(Judge's initials) (Date)

Tentative Ruling

Re: **Fresno Credit Bureau v. Cripps**
Superior Court Case No. 03CECG01456

Hearing Date: September 29th, 2003 (**Dept 70**)

Motion: Plaintiff's Motion for Summary Judgment

Tentative Ruling:

To deny the plaintiff's motion for summary judgment, without prejudice. (CCP § 437c.)

Explanation:

Plaintiff has failed to give notice of the motion for summary judgment at least 80 days prior to the hearing date. CCP § 437c(a) requires the moving party to give notice at least 75 days prior to the date of the hearing, plus another 5 days if notice is by mail. Hence, if plaintiff wished to give timely notice of the original September 25th hearing date, plaintiff would have had to send notice by mail no later than July 7th. Here, plaintiff did not send notice until July 14th. Even if the court were to calculate notice by the continued hearing date of September 29th, the notice is still untimely. Plaintiff has not sought an order shortening time for service of the motion, and in any event the court has no power to shorten time for service of a summary judgment motion. (*McMahon v. Superior Court* (2003) 106 Cal.App.4th 112, 118.) The court also notes that the notice of motion is ambiguous, since it lists September 23rd as the hearing date in the heading of the notice, yet it lists September 25th as the hearing date in the body of the notice. Therefore, the court cannot grant the motion for summary judgment.

Pursuant to CRC 391(a) and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling **hac** **9/25/03**
Issued By: _____ **on** _____.
 (Judge's Initials) (Date)

Tentative Ruling

Re: **Patulea v. Cobb**
Superior Court Case No. 00CECG11217

Hearing Date: September 29, 2003 (**Dept. 22**)

Motion: By plaintiff to reduce workers' compensation lien

Tentative Ruling:

The court, on its own motion, continues the hearing to Tuesday, October 7, 2003, in Dept. 22, at 3:30 p.m. Although it does not appear to have been regularly calendared, the lien claimant's motion to apply for a first lien will also be heard on Tuesday, October 7, 2003, in Dept. 22, at 3:30 p.m.

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling **DSB** **9-25-03**

Issued By: _____ **on** _____.
 (Judge's initials) (Date)

Tentative Ruling

Re: **Grant v. Kaiser Permanente, et al**
Superior Court Case No. 02CECG01783

Hearing Date: September 29, 2003 (**Dept. 73**)

Motion: Demurrer to 2nd amended complaint

Tentative Ruling:

To sustain with 10 days leave to amend.

Explanation:

Though plaintiffs have offered evidence, in opposition to defendants' summary judgment motion, that they did not suspect that Mrs. Grant's death was the result of medical negligence until after 5/23/01, such facts have not been pleaded in the 2nd amended complaint, and the dates that are pleaded demonstrate that the action is barred by the statute of limitations.

And while plaintiff has now named 3 of the 4 children of the deceased as additional plaintiffs in this action, he has referred to the 4th child without either joining him as a party plaintiff or defendant, or explaining why he cannot be joined.

The demurrer is therefore sustained, with 10 days leave to amend. Plaintiffs must either join Troy Grant as a party or provide a satisfactory explanation of why he cannot be joined.

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

The time in which the complaint can be amended will run from service by the clerk of the minute order. All new allegations in the third amended complaint are to be set in **boldface** type.

Tentative Ruling MWS 9/25/03

Issued By: _____ **on** _____.
 (Judge's initials) (Date)

Tentative Ruling

Re: **Millard v. Michael Cadillac**
Superior Court Case No. 02CECG01609

Hearing Date: Sept. 29, 2003 **(Dept. 70)**

Motions: Plaintiffs' Motion for Leave to File Second Amended Complaint.

Tentative Ruling:

To DENY WITHOUT PREJUDICE. (CCP 473 (a)(1), 576.)

Explanation:

Defendant Michael Cadillac argues correctly that the proposed Second Amended Complaint is defective on its face because it contains allegations against Avis and General Motors, defendants which have been dismissed from this case. Plaintiffs dismissed the claims against Avis with prejudice and the claims against General Motors without prejudice.

Pursuant to CRC 391 (a) and CCP 1019.5 (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling **hac** **9/25/03**

Issued By: _____ **on** _____.

(Judge's initials) (Date)